Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. ~~78-~~930

SHERMAN EDWARD JACKSON,

Petitioner,

v.

STATE OF OREGON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

PHILLIP M. MARGOLIN
Nash & Margolin
555 Oregon Nat'l Bldg.
610 S.W. Alder
Portland, OR 97205
Telephone: (503) 248-0731
Attorney for Petitioner

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. _____

SHERMAN EDWARD JACKSON,

Petitioner,

v.

STATE OF OREGON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

Petitioner prays that a writ of certiorari issue to review the judgment of the Oregon Court of Appeals which was made and entered in the above case, on March 13, 1978. A Petition for Review was filed with the Oregon Supreme Court and this Petition was denied on July 26, 1978. The Order entering the Mandate in this case was filed on August 12, 1978.

CITATION TO OPINION BELOW

Petitioner was charged with violating ORS 166.270, Ex-Convict in Possession of Firearm. A jury found petitioner guilty and the trial court sentenced him to be imprisoned in a correctional facility of the State of Oregon for an indeterminate period of time, the maximum term of which could not exceed fifteen (15) months. The Court also recommended that petitioner be admitted to a Work Release Program.

Petitioner appealed the judgment of the trial court to the Oreogn Court of Appeals. The judgment of the Court of Appeals was affirmed in State of Oregon v. Sherman Edward Jackson, 33 Or App 139, 575 P2d 1001 (1978). The Oregon Supreme Court denied petitioner's Petition for Review and a mandate was entered on August 12, 1978.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTION PRESENTED

1. Was it error for the trial court to deny petitioner's Motion to Dismiss on the grounds that petitioner was being subjected to Double Jeopardy?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this Petition are the Fifth and Fourteenth Amendments to the United States Constitution.

Amendment V.

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of his life or limb . . ."

Amendment XIV.

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF FACTS

On November 11, 1976, Portland Police and Multnomah County Sheriff's Deputies were executing a search warrant at the home of Daniel Harvey. Petitioner had a fight with the police and was arrested on several misdemeanor charges. [TR. I, 4-6] He was taken

to the police station. [TR. I, 15-16]

Sometime after petitioner had been removed from the scene, Sergeants Branagan and Lambert left Mr. Harvey's residence and saw petitioner's car parked at the curb, blocking eastbound traffic. The officers tried to move the car into the curb and, while doing so, Sgt. Lambert noticed a handgun lying on the floor underneath the steering column. He seized the weapon. A record check was made and it revealed the the gun was stolen. [TR. I, 20, 29-30]

In 1967, petitioner had been sentenced to the state penitentiary for committing the felony crime of burglary. Petitioner was charged with being an ex-convict in possession of a firearm in violation of ORS 166.270. His trial on this charge commenced on February 15, 1977. [TR. II, 152] The prosecutor was of the personal opinion that peritioner was in possession of the weapon because he associated with the "criminal element". There was not a single shred of

evidence offered at trial to support this personal belief. Despite this fact, on the record, the prosecutor stated that it was her avowed purpose to inform the jury in any way she could that petitioner associated with the "criminal element'.

> "Well, Your Honor, maybe I can - - - I won't make any bones about it. If I could say it plainly to the jury, I would do it that way. If I have to do it by innuendo, I will try and do it that way. My point is that this man was in possession of a weapon because he associates with the criminal element. . . " [TR. II, 179]

Prior to trial, petitioner moved to have excluded from evidence the fact that petitioner was arrested as a result of a fight with the police on the day that the gun, which formed the basis for the Ex-Convict in Possession charge, was found. [TR. I, 2, 91] The trial court told the prosecutor not to bring these facts up during voir dire or it would be a basis for mistrial. [TR. I, 92]

A jury was sworn. [TR. I, 106] Prior to witnesses being called, the Court ruled

that the evidence concerning the defendant's scuffle, the arrest in the house, and the charges that were brought against him were inadmissible because the prejudice caused by the introduction of such evidence would outweigh any probative value that the evidence might have. The Court told the prosecutor "I'm going to give you an opportunity to discuss it with your officers prior to bringing the jury out, so that they do not bring forward the evidence of what occurred in the house." [TR. I, 111-112]

The State's first witness was Sgt. Branagan. [TR. I, 114-115] After some preliminary questions, the following occurred:

> "[DISTRICT ATTORNEY] Q: [When you saw the car blocking traffic] were you aware of to whom the vehicle belonged?
>
> . . .
>
> "A: To the defendant.
>
> "Q: Would it be Sherman Jackson, seated next to counsel here?
>
> "A: Yes (indicating defendant).

> "Q: Was Mr. Jackson at the scene at that point in time?
>
> "A: Yes.
>
> "Q: Why didn't you ask him to move it, then?
>
> "A: He was in custody at the time." [TR. I, 116]

At this point, petitioner made the following motion:

> "MR. MARGOLIN: I would at this time move to have this case dismissed with prejudice. We have chosen a jury that Mr. Jackson and I are satisfied with. There was not more than fifteen minutes ago specific instructions by this Court to the District Attorney as to what areas the District Attorney could go into with the witnesses. I do not want to move for a mistrial because I am satisfied with the jury. I do not want to have to retry this case.
>
> I am put in a position, however, due to the misconduct of the District Attorney and the District Attorney's witness, where I am forced into either permitting this type of testimony to go to the jury over the Court's direct instruction, or moving for mistrial. I don't think that is fair to Mr. Jackson. I think it is just a blatant abuse of the Court's instructions, so I move at this time for dismissal of this prosecution.

"THE COURT: Mr. Margolin, the Court will deny your Motion to Dismiss with Prejudice . . .

. . .

"THE COURT: If you wish to move for a mistrial, - - -

"MR. MARGOLIN: Well, I don't want to, because I like the jury, and I don't want to put Mr. Jackson in the position of having to go through a second trial in this case." [TR. I, 117-119]

The trial continued and the State called Sgt. Lambert as its next witness. [TR. I, 124] Almost immediately, the following occurred:

"Q: [DISTRICT ATTORNEY] Alright. What did you do with the vehicle after you seized it, or excuse, me, the weapon?

"A: The minute I retracted it from the car, there was a City Police Officer with me with a walkie talkie. We checked the numbers on the gun for stolen. It was stolen. We - - -

"MR. MARGOLIN: Your Honor, I have a matter I would like to take up with the Court.

. . .

"MR. MARGOLIN: Your Honor, I move for a dismissal with prejudice. . .

. . .

"THE COURT: Mr. Margolin, your motion for dismissal with prejudice will be denied, but the Court will consider your Motion for a mistrial.

"MR. MARGOLIN: I move for a mistrial.

. . .

"THE COURT: The motion for mistrial will be granted on the Motion of the defendant." [TR. I, 125, 127-128]

On the next day, a new jury was sworn. [TR. II, 132] Petitioner moved to dismiss the charge against the petitioner on the grounds of double jeopardy. This motion was denied. [TR. II, 138]

REASONS WHY A WRIT OF CERTIORARI SHOULD BE ISSUED AND THE IMPORTANCE OF THE ISSUE RAISED OUTSIDE OF THE FACTS OF THE SPECIFIC CASE

The Double Jeopardy issue.

In Crist v. Bretz, _ U.S. _, 57 L. Ed. 2d 24, 98 S. Ct. __ (1978) this Court stated that:

"The reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interest

> of an accused in retaining a chosen jury. That interest was described in Wade v. Hunter, supra, as a defendants 'valued right to have his trial completed by a particular tribunal.' 336 U.S., at 689, 93 L. Ed. 974, 69 S. Ct. 834. It is an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice. Throughout that history there ran a strong tradition that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict.
>
> "Regardless of its historic origin, however, the defendants 'valued right to have his trial completed by a particular tribunal' is now within the protection of the constitutional guarantee against double jeopardy, since it is that 'right' that lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn. . ." Id., 57 L. Ed. at 31-32

Petitioner had his 'valued right to have his trial completed by a particular tribunal' taken away from him by the misconduct of the district attorney and her witnesses. The district attorney was told by the trial court that evidence concerning petitioners arrest, his fight with the police and the charges

brought against him were inadmissible. She was told to discuss this ruling with her officers prior to having the jury brought out so that those officers would not bring forward the forbidden evidence. [TR. I, 111-112] She was also told that a mistrial would result if this evidence was introduced. [TR. I, 92] The prosecutor stated on the record that she would try to show that petitioner associated with the criminal element and that she would do so either by saying it plainly to the jury or "if I have to do it by innuendo I will try and do it that way.". [TR. II, 179] Petitioner wanted his case tried before the first jury so badly that he did not request a mistrial after the first flagrant abuse of the trial courts order. [TR. I, 117-119] However, after the evidence concerning the stolen gun was introduced, petitioner was forced to move for mistrial and forced to give up the tribunal that he felt would render a fair verdict in his case.

In United States v. Dinitz, 424 U.S. 600,

96 S. Ct. 1075, 42 L. Ed. 2d 267 (1967) the United States Supreme Court stated that a defendant who was forced to request a mistrial because of prosecutorial misconduct is entitled to dismissal on grounds of double jeopardy even though he has requested the mistrial.

> "The Double Jeopardy Clause does protect the defendant against governmental actions intended to provoke mistrial requests and thereby subject defendant to the substantial burden imposed by multiple prosecution. It bars jury trials where 'bad faith conduct by the Judge or prosecutor' threatens the '[H]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant. [Citations ommitted]" Id., 96 S. Ct. at 1081-1082

In Commonwealth v. Bolden, 373 A2d 90 (1977), the Supreme Court of Pennsylvania discussed whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is violated by the retrial of a defendant after the original trial has ended in a mistrial granted at his request. In the

course of its lengthy and scholarly discussion of the Double Jeopardy Clause, the Court stated:

> "It is unclear from the [United States] Supreme Court cases whether "overreaching' is limited to intentional misconduct or whether it extends to gross negligence on the part of the prosecutor or judge. It is extremely difficult to establish that prosecutorial or judicial error was intentional . . . a defendant's right may not be adequately protected if he is required to prove that the errors were intentional.
>
> "The United States Court of Appeals for the Fifth Circuit has taken the position that overreaching involving gross negligence as well as intentional misconduct bars retrial after a defendant's mistrial motion is granted. United States v. Kessler, [530 F2d 1246 (CA 5, 1976)]; United States v. Beasley,]479 F2d 1124 (CA 5) cert den 414 U.S. 924 (1973)]. We conclude that the Fifth Circuit's view is warranted by the policies underlying the Double Jeopardy Clause and adopt the position taken in Kessler and Beasley.
>
> "The Double Jeopardy Clause is not designed solely to preclude bad faith harassment of an individual by governmental

> prosecutors. It also serves, as emphasized earlier in this opinion, 'to protect the defendant from continued exposure to embarassment, anxiety, expense and restrictions on his liberty' . . . prosecutors and judges are public officials entrusted with substantial and sensitive responsibilities. They are required to act in the public interest which includes protecting the rights of the accused. Society rightfully expects that they maintain professional competence in the exercise of their functions. . . a defendant forced to request a mistrial by conduct which conspicuously fails to satisfy professional standards should not be required to bear the heavy burden incident to reprosecution." Id., at 108-109

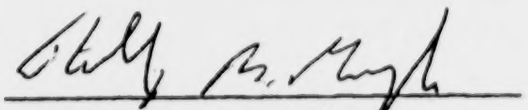
The actions of the prosecutor and her witnesses which caused the trial court to invite a mistrial motion on two occasions and forced the petitioner to finally ask for a mistrial, were, at minimum, gross negligence. There is also evidence that they were part of a plan to try petitioner by innuendo In either case, petitioner was denied his constitutional right to have his case heard by the first jury he selected. This Court

should accept review in this case to decide whether prosecutorial "overreaching" is limited to intentional misconduct by a prosecutor or whether it extends to gross negligence on the part of the prosecutor or judge. It should also accept review in this case to indicate to prosecutors that the type of conduct which occurred in this case is impermissible.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to the Oregon Court of Appeals.

Respectfully submitted,



PHILLIP M. MARGOLIN
Attorney for Petitioner

In the Circuit Court of the State of Oregon

For Multnomah County

THE STATE OF OREGON,	)	
	)	No. C 76-12-17536
Plaintiff,	)	DA 130224 SECRET
	)	PPB 76-87164
v.	)	
	)	INDICTMENT FOR VIO-
SHERMAN EDWARD JACKSON,	)	LATION OF ORS 166.
	)	270
Defendant.	)	

The above-named defendant is accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crime of EX-CONVICT IN POSSESSION OF FIREARM committed as follows:

The said defendant, on or about November 11, 1976, in the County of Multnomah, State of Oregon, did unlawfully and knowingly possess a firearm capable of being concealed upon the person, to wit: a revolver, having previously been convicted in Linn County, Oregon, on December 26, 1967, of the felony of Burglary Not in a Dwelling, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated December 15, 1976, at the City of Portland, in the County aforesaid.

Witnesses

Examined Before the Grand Jury:

Raymond Jones
Daniel Lambert
Dennis Branagan

Robert Miller
Robert Zion (by report)
Ruth Howard (by report)

Security Amount: $ 1,505 .

A TRUE BILL

/s/ ELAINE PIPER
Foreman of the Grand Jury

HARL HAAS, District Attorney

By /s/ ROBERT W. DEWEY Deputy

In the Circuit Court of the State of Oregon

For Multnomah County

THE STATE OF OREGON, Plaintiff, v. SHERMAN EDWARD JACKSON, Defendant.	)	No. C 76-12-17536 DA 130224 JUDGMENT AND PROBATION ORDER

On March 22, 1977, this matter came before the court, the plaintiff appearing by Marilyn Curry, Deputy District Attorney, and the above-named defendant appearing in person and with his attorney, Phillip M. Margolin.

IT IS ADJUDGED that the said defendant has been convicted on his plea of Not Guilty and Verdict of GUILTY of the offense of EX-CONVICT IN POSSESSION OF FIREARM, and this being the time for imposition of sentence, and no reason appearing to the court why sentence should not be pronounced at this time,

IT IS FURTHER ADJUDGED that said defendant be imprisoned in a Correctional facility of the State of Oregon for an indeterminate period of time, the maximum term of which

shall be and hereby is fixed at Five (5) years, and said defendant is hereby committed to the legal and physical custody of the Corrections Division of the State of Oregon.

IT IS FURTHER ADJUDGED that execution of sentence is suspended and defendant placed on probation to the Corrections Division of the State of Oregon for a period of Two (2) years from this date, on condition that he report as often as directed to said Corrections Division, and not again violate any laws, and on the further conditions (1) that he be imprisoned in the Multnomah County Jail for a period of One (1) year, commencing April 4, 1977, said defendant to report forthwith to the Multnomah County Courthouse Jail for the booking-in process and to report directly to the Multnomah County Jail at Rocky Butte on Monday, April 4, 1977, and it is the recommendation of this court that he be incarcerated in the Multnomah County Correctional Facility and that defendant be admitted to the work release program, (2) that he abstain from the

use of any narcotic or dangerous drug, (3) that he have no involvement in prostitution activities or any other illegal activity, and (4) that he submit to search of his person or property conducted in a reasonable manner and at reasonable times by his probation officer.

IT IS FURTHER ORDERED that security amount in any appeal filed herein shall be fixed in the amount of $5,000.00

Stenographic notes of the above proceeding were made by the official court reporter, Florence LaMar.

RICHARD L. UNIS, Judge

[ ]

Mr. Phillip M. Margolin
Attorney at Law
909 Oregon National Bldg.
610 S.W. Alder St.
Portland, Oregon 97205

[ ]

Distribution:
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Pol. File No.
PPB 76-87164

No. 131-March 13, 1978

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON, Respondent,
v.
SHERMAN EDWARD JACKSON, Appellant.
(No. C 76 12 17536, CA 8168, CA 8403)

(Cases Consolidated)

Appeal from Circuit Court, Multnomah County.

Richard L. Unis, Judge.

Argued and submitted December 15, 1977.

Phillip M. Margolin, Portland, argued the cause and filed the brief for appellant.

Jan P. Londahl, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were James A. Redden, Attorney General, and Al J. Laue, Solicitor General, Salem.

Before Schwab, Chief Judge, and Thornton and Joseph, Judges.

Affirmed.

THORNTON, J.

THORNTON, J.

Defendant was convicted after jury trial of being an ex-convict in possession of a concealable firearm. ORS 166.270. He appeals, assigning as error the following:

(1) Overruling defendant's motion to dismiss on account of former jeopardy;

(2) Permitting (a) inquiry into security measures at defendant's house approximately one year prior to the present charge, (b) testimony regarding items stolen in a 1975 burglary at defendant's house, and (c) the use of "innuendo" regarding defendant's criminal connections during the prosecution's closing argument;

(3) Giving the jury an unfair definition of the term "imminent";

(4) Denying defendant's motion to suppress;

(5) Permitting the prosecutor to introduce inadmissible testimony; and

(6) Refusing to allow defendant to introduce certain threatening letters.

On the day of the crime charged defendant drove to the home of Daniel Harvey in the city of Portland. When he arrived he found the police executing a search warrant. An altercation between defendant and the police ensued, ending in defendant's being arrested.

Some time after defendant had been taken to the police station, other police saw defendant's automobile stopped at the curb adjacent to Daniel Harvey's house with the front end of the vehicle headed into the curb and the rear end protruding into the main-travel-

led portion of the street and causing a traffic hazard. The officers testified that they attempted to move the vehicle and park it legally, but could not because the steering wheel was in a locked position. As they were looking into the vehicle the officers saw a handgun on the floorboard. When the officers subsequently discovered that defendant had been previously convicted of a felony, the instant charge was filed.

At trial defendant testified that he was carrying the handgun because of his fear of a man named John W. Barger, and raised the so-called choice of evils defense. ORS 161.200. In order to understand defendant's defense, it is necessary that we set forth the following additional facts. All of these events occurred prior to the episode that forms the basis of the present charge.

In September 1975 defendant was robbed at his Portland home by four armed men, including Barger. Thereafter defendant testified before the Multnomah County Grand Jury that indicted Barger. On March 7, 1976, Barger was arrested in Lane County on the Multnomah County warrant. On April 13, 1976, defendant went to Lane County and testified before the grand jury on another case pending against Barger. While in the Lane County Courthouse defendant saw Barger. The two men exchanged words. Defendant struck Barger.[1]

1 In State v. Jackson, 30 Or App 681, 567 P2d 1057, rev den (1977) this defendant interposed a similar defense involving the same John Barger. There defendant was charged with reckless driving and failure to give name and address at the scene of an accident.

The state, in an effort to rebut defendant's evidence concerning his motive for carrying the gun, offered evidence of the intensive security measures installed at defendant's house in 1975, the expensive jewelry and large amount of cash taken from defendant's house during the robbery. Defendant countered this by claiming that the reason for the security system was his fear of Barger.

Having examined each of defendant's assignments we conclude that none of his contentions can be sustained.

First, we find no error in the trial judge's refusal to grant defendant's motion to dismiss on the grounds of former jeopardy. This motion was based on a prior mistrial, which occurred under the following circumstances: In the prior trial defendant moved to have excluded from evidence his arrest as a result of the above described altercation with the police and the charges brought against him as a result. The trial judge agreed, granted this motion, and informed the state that such evidence would be a basis for a mistrial. Thereafter the first state's witness, Sgt. Branagan, in response to a question from the prosecutor, referred to the fact that defendant was "in custody" at the time his car was observed to be parked illegally. Defendant immediately moved to have the case dismissed with prejudice. The trial court denied the motion.

Thereafter, the next witness, Sgt. Lambert, in response to a question from the prosecutor as to what he had done next after seizing the handgun, stated that he checked the numbers of the gun by walkie-talkie and found that "[i]t was stolen."

Defendant again moved for dismissal with prejudice. The court denied the motion but

said it would consider a motion for a mistrial. Defendant then moved for a mistrial, which was granted.

On the next day a new jury was sworn. Defendant immediately moved for dismissal of the charge on the grounds of double jeopardy.

From our examination of the circumstances leading up to the mistrial, we can find no basis for characterizing the prosecution's conduct as intentional misconduct, bad faith or overreaching, or for ordering dismissal with prejudice. Cf., United States v. Dinitz, 424 US 600, 96 S Ct. 1075, 47 L Ed 2d 267 (1976). The record shows that the prosecutor had previously discussed with the police witnesses the fact that there was to be no testimony concerning the altercation that led to defendant's arrest. The trial judge did not err in refusing to dismiss the charge against defendant.

In his second assignment defendant had raised three alleged errors.

(a) We can find no objection by defendant as to the testimony regarding the security system. The objection was to the question as to what items defendant had lost in the robbery.

(b) As we view it, the testimony regarding the value of the stolen items was permissible to show the prosecution's theory that defendant may have had a different motive than fear of Barger for carrying a gun, viz, to protect large amounts of cash and other valuable assets in his possession. State v. Jackson, 30 Or App 681, 567 P2d 1057, rev den (1977).

(c) Nor do we find to be reversible error the prosecution's comment concerning how defendant learned the identity of the persons

who robbed him. This has reference to the fact that defendant apparently gained this information by simply asking neighbors if they knew who the robbers were. Defendant argues that by pointing this out in the closing argument the prosecution was attempting to show by innuendo that defendant habitually associated with the "criminal element."

We fail to see how the implication that defendant associated with criminals and is a bad person follows from the above statement, nor can we see how it could be regarded as seriously prejudicial or likely to have changed the result of the trial in any event. The trial court did not abuse its discretion in failing to sustain the objection.

Third, we find no error in the trial court's defining the word "imminent" or in instructing the jury on the definition of that word. This assignment refers to the word "imminent" in ORS 161.200(1)(a), which provides:

> "(1) Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:
>
> "(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury * * *."

The court instructed the jury as follows:

> "'Imminent' is to be given its ordinary meaning, that is, immediate, ready to take place, near at hand."

The above instruction was sufficient.

Fourth, it was not error to deny defendant's motion to suppress the handgun. The officer knew that defendant had arrived at the scene in the automobile involved. The weapon was in plain view when they saw it. They had probable cause to believe that defendant had possession of it without a permit in violation of ORS 166.250 or section 14.32.010, Code of the City of Portland, or both. The seizure was proper and the trial court so found. State v. Riley, 240 Or 521, 402 P2d 741 (1965). See also, Cady v. Dombrowski, 413 US 433, 93 S Ct 2523, 37 L Ed 2d 706 (1973); State v. Lewis, 10 Or App 378, 499 P2d 836, rev den (1972); State v. Bright, 8 Or App 202, 493 P2d 757 (1972). State v. Mays, 19 Or App 518, 528 P2d 109 (1974), is inapposite. In Mays there was conflicting evidence and the trial court resolved those fact issues favorably to the defendant. Those findings were therefore binding on this court under Ball v. Gladden, 250 Or 485, 443 P2d 621 (1968).

Fifth, the trial judge did not abuse his discretion in allowing the state to ask Officer Veteto if the threatening letters from Barger related to defendant and the effect of the threats on Veteto. This issue arose as follows: On direct examination of Officer Veteto, defendant's counsel elicited, over the prosecutor's objection, testimony that Veteto had received letters from Barger which might be construed as veiled threats against Veteto. The prosecution then proceeded to cross-examine Veteto asking if the threatening letters from Barger referred to defendant and whether Veteto felt threatened by the letters.

Inasmuch as defendant had opened the door on the subject, the trial judge did not

err in permitting the prosecution to rebut the implication that the letters contained threats against defendant. Likewise it was not error to refuse to permit the introduction into evidence of the letters mentioned above since the letters did not mention defendant, and no threat to defendant arising out of the letters was communicated to him.

Affirmed.

State Seal OREGON SUPREME COURT

July 26, 1978

CASE TITLE: STATE V. SHERMAN EDWARD JACKSON
CA 8168

Phillip M. Margolin
Attorney at Law

The Supreme Court on July 25, 1978, denied appellant's Petition for Review in the above-entitled matter.

cc - Walter L. Barrie

STATE COURT ADMINISTRATOR

BY /s/ Marilyn Hartley
Marilyn Hartley
Calendar Clerk

SUPREME COURT State Seal COURT OF APPEALS

Loren D. Hicks
State Court Administrator

Telephone Area Code - 503

Case Records 378-6005
Supreme Court Building Legal Counsel 378-6022
Salem, Oregon 97310 Administrator 378-6046

August 4, 1978

Mr. Phillip M. Margolin
Nash & Margolin
Attorneys at Law
555 Oregon National Building
610 S.W. Alder
Portland, Oregon 97205

Re: State v. Sherman Edward Jackson
CA #8168
Multnomah #C 76-12-17536

Dear Mr. Margolin:

The Court of Appeals has today denied the appellant's motion to stay the Court of Appeals mandate in this matter.

Very truly yours,

/s/ David Gernant

David Gernant
Legal Counsel

DG:dj

cc: Mr. Walter L. Barrie

STATE OF OREGON

COURT OF APPEALS

STATE OF OREGON, Respondent, v. SHERMAN EDWARD JACKSON, Appellant.	)	JUDGMENT AND MANDATE
	)	Appeal from MULTNOMAH County
	)	No. C 76 12 17536 CA 8168

This cause having come on to be heard on appeal and having been duly submitted and considered; and the Supreme Court having denied review on July 25, 1978.

IT IS HEREBY ADJUDGED AND ORDERED that the decision entered below in this cause is affirmed.

IT IS FURTHER ORDERED that respondent recover from appellant costs and disbursements in this court in the amount of $0.

The cause is returned below for further proceedings pursuant to law and the opinion and order of the court entered March 13, 1978.

ISSUED at Salem, Oregon:

STATE OF OREGON)
County of Marion.)

I, LOREN D. HICKS, State Court Administrator for the State of Oregon, do certify that this copy of ORDER is a correct transcript of the original, which is on file in my office.

IN TESTIMONY WHEREOF, I have affixed the seal of the Court at Salem, Oregon, this _____.

LOREN D. HICKS
State Court Administrator

by /s/ Carol Justis
Deputy Administrator

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

State of Oregon Plaintiff	)	No. C 76-12-17536
vs.	)	ORDER ENTERING MANDATE
Sherman Edward Jackson Defendant	)	

It appearing from the record that the mandate on the appeal herein has been returned and received by this court; it is therefore hereby

ORDERED that the mandate herein shall be entered in the record of this court and filed in the above-entitled cause.

Dated this 12th day of August, 1978.

/s/ Richard L. Unis
Judge, Circuit Court

Supreme Court, U. S.
FILED
MAR 5 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-930

SHERMAN EDWARD JACKSON,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES A. REDDEN
Attorney General of Oregon
WALTER L. BARRIE
Solicitor General
THOMAS H. DENNEY
Assistant Attorney General
State Office Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Respondent

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SHERMAN EDWARD JACKSON,

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Oregon Court of Appeals affirming petitioner's conviction of being an ex-convict in possession of a concealable firearm (Petition, at A-6 through A-13) is reported at 33 Or. App. 139, 575 P.2d 1001 (1978). The Oregon Supreme Court's denial of his petition for discretionary review of the court of appeals' decision (Petition, at A-14) is officially reported at 283 Or. 99 (1978). It is not reported unofficially in the National Reporter System.

JURISDICTION

The Oregon Court of Appeals affirmed petitioner's conviction on March 13, 1978. The Oregon Supreme

Court denied a timely petition for discretionary review on July 25, 1978.[1] No application was made to this Court for enlargement of the 90-day period prescribed by Rule 22(1) for the filing of petitions for certiorari in state-court criminal cases. The petition for certiorari herein was filed on November 8, 1978, 106 days after the Oregon Supreme Court's denial of review. This Court's jurisdiction was invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Petitioner's statement is accepted.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's statement is accepted.

STATMENT OF THE CASE

Petitioner's statement of the facts of this case is generally accurate, but incomplete and argumentative. By way of correction thereof, we add the following.

(1) The remark of the prosecutor on which petitioner largely bases his claim of misconduct in the first trial of this case (Petition, at 4-5, 11, 14) was made in the course of the *second* trial, during a discussion concerning the admissibility of a kind of evidence (petitioner's association with known criminals) different from that which had been ruled inadmissible in the first trial (petitioner's struggle with

[1]Petitioner incorrectly gives this date as July 26, at page 1 of his petition. But see Petition, at A-14, where the correct date is clearly shown.

the police and arrest on other charges at the time the prohibited weapon was found in his automobile) (See Petition, at 4-5).

(2) At the beginning of the first trial herein, the trial court gave the prosecutor an opportunity to explain to her witnesses that the court had ruled inadmissible any evidence of petitioner's struggle with the police and arrest on other charges at the time the weapon was found (I Tr. 111-112). In the course of responding to petitioner's first motion for mistrial, the prosecutor represented that she had done so, and that the testimony on which the motion was based had been unintentionally elicited (I Tr. 118; *cf.* Petition, at 7-8). The court promptly struck the testimony in question and instructed the jury to disregard it (I Tr. 121).

(3) As the trial court pointed out when it granted petitioner's second motion for mistrial, the police officer's testimony on which the motion was based (the fact that the prohibited weapon had been stolen) was not within the scope of the court's prior ruling excluding evidence of petitioner's struggle with the police and arrest (I Tr. 92, 108-109, 126-127; *cf.* Petition, at 8-9).

REASONS FOR DENYING THE WRIT

A. The petition is untimely filed.

If we correctly understand the rules of this Court and their application to Oregon criminal cases, the

90-day period prescribed by Rule 22(1) for petitioning for certiorari in this case should be based on July 25, 1978, the date the Oregon Supreme Court denied a petition for discretionary review herein, and not, as counsel for petitioner seems to think,[2] on August 12, 1978, the date of the trial-court order subsequently entering the mandate of the Oregon Court of Appeals. See Stern & Gressman, Supreme Court Practice § 6.2 (5th ed. 1978). Hence, as we understand it, the 90th day for filing a petition for certiorari in this case was October 23, 1978. Counsel for the petitioner herein, apparently relying on his own interpretation of Rule 22(1), made no application to this Court for an enlargement of the time allowed under the rule, but nevertheless filed the petition herein on November 8, 1978, 106 days after the Oregon Supreme Court decided not to hear this case. We submit that the petition is therefore untimely filed.[3]

We recognize that, even if our understanding of the Court's rules is correct, the mere fact that the petition herein is untimely filed does not deprive the Court of jurisdiction to consider it. See *Schacht v. United States,* 398 U.S. 58, 63-65 (1970) (construing Rule

[2]See Petition, at 1, 2.

[3]We note in passing that counsel for petitioner attempted, unsuccessfully, to stay the issuance of the court of appeals' mandate to the trial court (Petition, at A-15). Under the circumstances, we cannot help wondering whether, under petitioner's interpretation of Rule 22(1), an indefinite stay of the mandate would have extended indefinitely the time in which to petition for certiorari.

22(2) in a federal criminal case). We submit, however, that the petition herein does not demonstrate any compelling reason for belatedly waiving the Court's rules with respect to timeliness of filing, and that the untimeliness of the petition is therefore a valid reason for denying certiorari in this case.

B. The decision below correctly holds, on the facts of this case, that the Constitutional question urged by petitioner herein is not properly presented.

As his principal argument for the grant of certiorari in this case, after discussing the scope of the holding in *United States v. Dinitz,* 424 U.S. 600 (1976), petitioner suggests that

> This Court should accept review in this case to decide whether prosecutorial "overreaching" [so egregious as, not only to require a mistrial, but also to bar retrial on Double-Jeopardy grounds] is limited to intentional misconduct by a prosecutor or whether it extends to gross negligence on the part of the prosecutor or judge. (Petition, at 14-15).

We note at the outset that, notwithstanding petitioner's reference to the trial judge in this formulation of the issue presented, the petition herein does not appear to raise any claim of misconduct on the part of the judge, and no such contention was made below. Presumably, the reference to the judge was included in an attempt to echo the language of *Dinitz* and the other cases cited by petitioner.

More importantly, if this were a case in which the Oregon Court of Appeals had held that the conduct of the prosecutor, while grossly negligent, did not reach the level of "bad faith conduct" condemned in *Dinitz,* we might agree that — with the exception noted above — the question formulated by petitioner is appropriately presented herein. But this is not such a case. It is simply a case in which the court of appeals concluded, from the record herein, that there was "*no basis* for characterizing the prosecutor's conduct as intentional misconduct, bad faith or overreaching" (Petition, at A-10; 33 Or. App. at 143; 575 P.2d at 1003) (emphasis added); and as our supplemental statement of the case herein demonstrates, the record supports that conclusion. This Court should not disturb it.

Petitioner is really asking this Court to retry the factual question of the prosecutor's supposed culpability in this case, as is evidenced by petitioner's argument that, contrary to the court of appeals' determination, the prosecutor's actions "were, at a minimum, gross negligence," or even "part of a plan to try petitioner by innuendo" (Petition, at 14). Review for this purpose is not warranted.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES A. REDDEN
Attorney General of Oregon

WALTER L. BARRIE
Solicitor General

THOMAS H. DENNEY
Assistant Attorney General
Counsel for Respondent

March 1979